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# State Water Resources Control Board

## Division of Financial Assistance

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Arnold Schwarzenegger  
Governor

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## NOTICE TO CLAIMANTS SEEKING WAIVERS OF UNDERGROUND STORAGE TANK PERMITTING REQUIREMENTS

For claims filed on and after January 1, 1994, waivers of underground storage tank (UST) permitting requirements are generally available for UST permits that were required before January 1, 1990, and may not be used to excuse UST permit noncompliance that extended beyond January 1, 1990. In a recent court decision, which is explained below, an exception to this general rule was established for claims that involve certain facts. Also, there is recent legislation that expands the availability of UST permit waivers.

### Kelsoe v. State Water Resources Control Board (Kelsoe Opinion) – Applies to Fund Claims Filed between January 1, 1994 and December 31, 2007

The Court of Appeal issued an opinion in *Kelsoe v. State Water Resources Control Board* (2007) 153 Cal.App.4<sup>th</sup> 569. To demonstrate permit compliance, a claimant must have obtained a UST permit issued under Health and Safety Code (H&SC) section 25284 when the claimant became subject to permitting requirements, or when the applicable local agency began issuing permits, whichever is later. The *Kelsoe* Opinion maintains the January 1, 1990, cutoff date for UST permit waivers (waiver may only be used to excuse permit noncompliance that occurred before January 1, 1990), **except** in cases with fact patterns similar to those present in the *Kelsoe* Opinion. Thus, under the *Kelsoe* Opinion, claimants may seek a UST permit waiver ([Kelsoe Permit Waiver form](#)) for permit noncompliance that continued beyond January 1, 1990, but only if all of the following are met:

1. The Fund claim was filed on or after January 1, 1994.
2. The claimant was subject to UST permit requirements (i.e., owner or operator of UST) before January 1, 1990.
3. After a period of noncompliance, the claimant obtained a UST permit issued under H&SC section 25284.
4. After obtaining the H&SC section 25284 UST permit, the claimant complied with UST permitting requirements for a substantial period of time.
5. The claimant paid thousands of dollars in UST storage fees into the Fund for the UST that is subject of the claim.

If a claimant falls within this fact pattern and the claimant satisfies the criteria for a permit waiver ([Permit Waiver form](#)) contained in H&SC section 25299.57,



subdivision (d)(3)(B)(i)-(iii), then permit noncompliance that occurred before and after January 1, 1990, may be waived.<sup>1</sup> If a claimant does not fall within the above fact pattern but meets the permit criteria contained in H&SC section 25299.57, subdivision (d)(3)(B), then the permit waiver may only be used to excuse pre-January 1, 1990 permit noncompliance.

Assembly Bill 1437 (Aghazarian) – Applies to Fund Claims filed on and after January 1, 2008

The Legislature recently enacted AB 1437 and it will become effective on January 1, 2008. This law specifies that permit compliance, for purposes of accessing the Fund, is satisfied if the claimant obtained a UST permit when the claimant became subject to UST permitting requirements or when the applicable local agency began issuing UST permits, whichever is later. This law also clarifies UST permit compliance for USTs that are hidden on property. If a Fund claimant acquires real property where a UST is situated, and despite reasonable diligence, the claimant was unaware of the UST at the time the real property was acquired, the claimant can demonstrate permit compliance if the claimant obtains a UST permit within a reasonable period of time, not to exceed one year, from when the claimant should have become aware of the UST or when the local agency began issuing UST permits, whichever occurs later.

Assembly Bill 1437 also expands availability and changes the criteria for waivers of UST permitting requirements. Under AB 1437, there is no cutoff date for UST permit waivers – permit waivers may be granted for permit noncompliance that occurred both before and after January 1, 1990, if all of the following criteria are met:

- The claimant was unaware of the permit requirement, and upon becoming aware of the permit requirement, the claimant complies with H&SC section 25284 (UST permitting requirements) or H&SC 25298 (UST closure requirements) within a reasonable period, not to exceed one year, from when the claimant became aware of the permit requirement.
- Before submitting the application to the Fund, the claimant has complied with H&SC section 25299.31 [financial responsibility requirements] and has obtained and paid for all permits currently required.

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<sup>1</sup> To satisfy H&SC section 25299.57, subdivision (d)(3)(B)(i)-(iii), the claimant must demonstrate that the claimant was unaware of the permit requirement prior to January 1, 1990, and there was no intent to intentionally avoid the permit requirement or the fees associated with the permit, and that before applying to the Fund, the claimant has complied with financial responsibility requirements, has obtained and paid for all permits currently required, and has paid all UST storage fees, interest, and penalties imposed pursuant to Article 5 (commencing with Section 25299.40) and Part 26 (commencing with Section 50101) of Division 2 of the Revenue and Taxation Code for the UST that is the subject of the claim.

- Before submitting the application to the Fund, the claimant has paid all UST storage fees, interest, and penalties imposed pursuant to Article 5 (commencing with Section 25299.40) and Part 26 (commencing with Section 50101) of Division 2 of the Revenue and Taxation Code for the UST that is the subject of the claim.

Claimants who qualify for the permit waiver under AB 1437 must pay a higher deductible on their claim, depending upon the date that the claimant complied with UST permitting or closure requirements. Claimants who comply on or before December 22, 1998, must pay twice the amount of deductible that would otherwise apply to the claim, and claimants who comply after December 22, 1998, must pay a deductible that is four times the amount that would otherwise apply to the claim.

**IMPORTANT NOTE:** If a claim is filed on or after January 1, 2008, the permit-waiver provisions contained in AB 1437 will apply, and not the law as it exists up until January 1, 2008, including the *Kelsoe* Opinion. Under existing law, including the *Kelsoe* Opinion, the availability of permit waivers is very limited. A waiver may not be used to excuse permit noncompliance that occurred after January 1, 1990, unless the claim involves facts similar to those in the *Kelsoe* Opinion. Under AB 1437, permit waivers will be available to more Fund claimants. That is because waivers can be used for permit noncompliance that occurred both before and after January 1, 1990, and a claimant does not need to fall within the limited fact pattern of the *Kelsoe* Opinion to qualify for permit waiver for post January 1, 1990, permit noncompliance.

Any claimants who believe, however, that they may qualify for a permit waiver under existing law, including the *Kelsoe* Opinion, but not under AB 1437, should file their claims with the Fund **before January 1, 2008**. Even if the claim is determined ineligible under the existing, relatively limited permit-waiver provisions, claimants may re-file claims on and after January 1, 2008. (Note: Claims may be subject to a higher deductible if a permit waiver is granted under AB 1437.)

The State Water Resources Control Board will develop new [Permit Waiver Request Forms](#) for claimants seeking permit waivers under AB 1437 (claims filed on and after January 1, 2008). These permit waiver request forms will be available no later than December 15, 2007, and may be obtained from the Fund website at <http://www.waterboards.ca.gov/cwphome/ustcf> or by calling (916) 341-5722.

If you have any questions regarding this notification, please contact Ginny Lagomarsino at [VLagomarsino@waterboards.ca.gov](mailto:VLagomarsino@waterboards.ca.gov) or (916) 341-5722.